IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 150.

In Re CHARLES M. WHITE, JOHN C. THOMPSON, AND HENRY SCHUTTER,

Petitioners,

vs.

AUGUST T. SCHLOEMER, EUGENE R. SCHLOEMANTZ, AND HENRY SOEMTZ, TRUSTEE,

Respondents.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONERS' BRIEF.

CHAS. W. PELKER,
Counsel for Petitioners.

IN SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 530.

IN RE. CHARLES M. WHITE, JOHN C. THOMPSON AND HENRY ECKSTEIN, PETITIONERS,

vs.

AUGUST T. SCHLOERB, EUGENE B. SCHICKEDANTZ, AND HENRY ROENITZ, TRUSTEE, RESPONDENTS.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner's Brief.

STATEMENT OF THE CASE.

On Sept. 13, 1899, August T. Schloerb and Eugene B. Schickedantz, copartners, filed their voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Wisconsin, and were, on the same day, adjudged bankrupts, and the matter referred to a referee in bankruptcy for further proceedings according to law. The bankrupts had conducted a boot and shoe store, which, upon the adjudication of bankruptcy, was locked by the bankrupts under the direction of the referee.

Thereafter, on September 21, 1899, James Cogan and Bernard Cogan, copartners, commenced an action of replevin against the said bankrupts in the circuit court of Winnebago county, Wisconsin, to recover the possession of certain specified goods then in the bankrupts' store. The proper undertaking and requisition in replevin in accordance with the laws of the state of Wisconsin, was delivered to the sheriff of Winnebago county, Charles M. White, one of the petitioners in this case, who delivered the papers for execution to

the petitioner, Henry Eckstein, an under-sheriff. In pursuance of said requisition, the under-sheriff, on the same day, and before the selection and appointment of the trustee in the bankruptcy proceeding, forcibly entered the store of the bankrupts, and took possession of certain goods, being a part of the goods specified in the writ of replevin.

September 23, 1899, the bankrupts presented their petition to the District court of the United States for the Eastern District of Wisconsin, setting forth the above facts, and also alleging that the goods so taken in the replevin proceeding were their lawful property. The petition alleged that the goods were in the possession of the petitioners, the sheriff and under sheriff mentioned, and John C. Thompson, the attorney for the plaintiffs in the replevin proceeding, and asked the court that they be compelled to redeliver the goods to the district court sitting in bankruptcy, and that they be enjoined from disposing of them.

Upon the filing of the petition the district court issued its mandate, requiring the petitioners here, the sheriff, the under-sheriff, and the attorney mentioned, to show cause before that court, why the seizure of the goods under the writ of replevin should not be vacated, and the goods returned to the bankrupts, or placed in the possession of the marshal or other person, and why tney shonld not be enjoined from interfering with the property so seized.

On the return day, the petitioners here specially appeared and moved the district court to set aside and vacate its mandate or order to show cause, for want of jurisdiction in the court of bankruptcy, over the subject matter, and also presented proof by affidavit to the effect that the assertion of title to the goods in question by the plaintiffs in the writ of replevin was founded upon a claim that the bankrupts had purchased the goods of James Cogan and Bernard Cogan upon false and fraudulent representations, upon which reliance had been placed; that before the writ of replevin they had elected to rescind the sale, and had demanded of the bankrupts the return of the goods.

The District Court of the United States entered an order that said Charles M. White, Henry Eckstein and John C. Thompson be restrained from selling or disposing of said property, and directing

them to turn over and deliver the same to the trustee, in the bankruptcy proceeding, and further directing the trustee, on receipt of the property, to keep the same separate and apart from the other property, to abide the further order of the court.

The petitioners, Charles M. White, Henry Eckstein and John C. Thompson thereupon filed their original petition in the United States Circuit Court of Appeals for the Seventh Circuit, praying said court to superintend and revise, in the matter of law arising therein, the proceedings had in the District Court, and thereupon a citation and notice to the bankrupts and their trustee in bankruptcy was issued and served, and the said bankrupts and their trustees in bankruptcy duly appeared in said Circuit Court of Appeals, and demurred to the petition of the petitioners herein. Thereafter a hearing was had in said Circuit Court of Appeals for the Seventh Circuit, and thereupon the said Court certified to this Honorable Court certain questions of law upon which it desires the the advice and instruction of this court for its proper decision. The questions certified are as follows:

1. Whether the District Court sitting in bankruptcy had jurisdiction, by summary proceedings, to compel the return of the property seized?

2. Whether, after an adjudication in bankruptcy, an action in a state court can be commenced and maintained against the bankrupt to recover property in the possession of, and claimed by the bankrupt at the time of the adjudication?

3. Whether the property of the bankrupt, upon his adjudication in bankruptcy, is in custodia legis of the bankrupt court, and can be taken possession of under process of a state court?

BRIEF OF ARGUMENT.

Though the amount at stake in this case is small, it is believed that important questions of jurisdiction involving the construction of the bankruptcy act of 1898, are involved. There is considerable diversity of opinion among the different district courts and circuit courts of appeal in regard to the proper interpretation of the act, and one of the reasons for certifying this case here is to have, if possible, a final determination of at least a part of these questions, as to which the lower courts are now at sea.

Before taking up the argument of the three questions certified up, we desire first briefly to consider the nature of the controversy between the parties, and second, the jurisdiction conferred upon the bankruptcy and state courts by the bankruptcy act of 1898, because in our opinion upon these questions the answers to the questions certified up must in a large part depend.

1.

NATURE OF THE CONTROVERSY.

James Cogan and Bernard Cogan, who were the plaintiffs in the replevin suit in the state court, claim to be the absolute owners of the property seized in the replevin action. Their claim to ownership and right of possession is founded on that rule of law *that when a purchaser makes false and fraudulent representations as to his sol vency and means of payment, and thereby induces the vendor to sell him on credit, he may rescind the contract and thereupon stands as the owner of the property and the party entitled to the possession thereof.*

Donaldson v. Farwell, 93 U. S. 631;

John V. Farwell Co. v. Hilton, 84 Fed. Rep. 293;

Montgomery v. Bucyrus Machine Works, 92 U. S. 257;

Benjamin on Sales, Curtis edition, Vol. I, 665, star paging 412 sec. 554;

Root v. French, 13 Wend. 570;

Buffington v. Gerrish, 15 Mass. 156;

Chitty on Contracts 356;

Bussing v. Rice, 2 Cush. 48;

Oswego Starch Factory v. Lendrom, 57 Iowa 153;

Carl v. McGonigal, 58 Mich. 567.

Farley v. Lincoln, 51 N. H. 577;

From the above it will be seen that Bernard Cogan and James Cogan, the plaintiffs in the replevin suit in state court claim to be the owners and claim to be entitled to the possession of the property in controversy.

And their right to the property was as great, as full and complete and as valid against the trustee in bankruptcy as it was against the bankrupts themselves.

Donaldson v. Farwell, 93 U. S. 631.

Therefore Bernard and James Cogan, and those representing them herein clearly claim the ownership and possession of the property adversely to the bankrupts and their trustee, and any controversy in regard to the ownership or possession is therefore between the bankrupts or their trustee in bankruptcy an *an adverse claimant.*

II.

Our contention is, *that the proper tribunals to determine controversies between the trustee and adverse claimants as to the ownership and right of possession of property are the state courts or the circuit courts of the United States when the amount and citizenship of the parties are such as give them jurisdiction*, and that by the bankruptcy act of 1898 *exclusive* jurisdiction of such controversies is given to the state courts and the circuit courts of the United States in proper cases.

Courts of bankruptcy are not courts of general jurisdiction, but are courts of limited and special jurisdiction.

In determining whether or not the courts of bankruptcy, under the act of 1898, have jurisdiction or not over controversies between the trustee and adverse claimants in regard to the ownership or possession of property, we must consider and interpret the bankruptcy act of 1898 in the light of the history of preceding bankruptcy laws in the United States.

Under the former bankruptcy acts of 1841 and 1867, jurisdiction of controversies between the assignees in bankruptcy and adverse claimants was conferred by the acts upon courts of bankruptcy.

See sec. 2, Bankruptcy Act of 1867; and sec. 8 of the Bankruptcy Act of 1841.

And the state courts were not *expressly* given jurisdiction thereof.

The decisions in the district courts of the United States were were conflicting as to whether or not the bankruptcy courts had exclusive jurisdiction of such controversies, or whether the state courts had concurrent jurisdiction.

This conflict in the decisions was finally set at rest by the Supreme Court of the United States. In Eyster v. Gaff, 91 U. S. 521, this court, on page 525, said: "The opinion seems to have been quite prevalent in many quarters at one time that the the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all the control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court except insofar as the circuit courts have concurrent jurisdiction, and that other courts can proceed no farther in suits of which they had at that time full cognizance, and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. *The debtor of the bankrupt, or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions.* If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts."

See also Smith v. Mason, 14 Wall, 433;

Burbank v. Bigelow, 92 U. S. 179, where this court says: "That the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons."

In Burbank v. Bigelow, the action was commenced, as in our case, after the filing of the petition in bankruptcy, and after the adjudication against the bankrupt and before the assignment by the bankrupt to the assignee, as in our case it was commenced against the bankrupt before the appointment of a trustee.

We have referred to these decisions here simply to show that even though, in the bankruptcy act of 1867, jurisdiction of contro-

versies with adverse claimants was expressly conferred upon the bankruptcy court, that it was settled by Your Honorable Court that the contestant still had the right to bring an action to decide such controversy in the proper state court, or in the circuit court of the United States, if that court had jurisdiction by reason of the citizenship of the parties and the amount involved.

THE BANKRUPTCY ACT OF 1898.

It will be noticed in the first place, that the bankruptcy act of 1898 nowhere grants to the bankruptcy courts the jurisdiction of controversies between adverse claimants and the bankrupts or their trustee. That is, that it has no section 2, like the bankruptcy act of 1867, and no section 8, like the bankruptcy act of 1841.

Therefore, it may be well said that there is no foundation for the argmment that the bankruptcy court, under the act of 1898, has jurisdiction of such controversies. The intent of Congress to take away such jurisdiction is apparent from the ommission of the grants of such jurisdiction contained in the prior acts.

Bankruptcy courts depend for their jurisdiction upon the terms of the act creating them. They are not courts of general jurisdiction, and there is no presumption in favor of their jurisdiction.

If the objection to the jurisdiction of the bankruptcy courts over such controversies was based alone upon the failure of the act to provide such jurisdiction, we think that the objection would have to be sustained.

The argument is, however, not so limited. Not only does the bankruptcy act of 1898 fail to grant to bankruptcy courts such jurisdiction, but it goes further and limits them from exercising such jurisdiction.

Such is the plain reading of the act. In subdivision 7, section 2, chapter 2, of the act of 1898, it is provided: "That courts of "of bankruptcy have jurisdiction (7) to cause the estates of "bankrupts to be collected, reduced to money and dis- "tributed, and determine controversies in relation thereto, *ex- "cept as herein otherwise provided.*"

That is, Congress, fearful lest the jurisdiction to cause estates of bankrupts to be collected and determine controversies in regard

to the collection thereof, should be construed to give the bankruptcy courts jurisdiction over controversies between adverse claimants and the trustee, inserted therein the words, "*except as herein otherwise provided.*" And in Chapter 4, "Courts and procedure therein," and in section 23 of said chapter entitled "Jurisdiction of United States and state courts," congress carefully fixed a limit to the jurisdiction of courts of bankruptcy in regard to such controversies.

> The section referred to is as follows: "Sec. 23. Jurisdiction of United States and state courts. a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between the trustees as such and adverse claimants concerning the property acquired or claimed by the trustees in the same manner, and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been been between the bankrupts and such adverse claimants.
>
> Suits by the trustee shall *only be brought and prosecuted in the courts where* the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

That the above section was intended to fix and limit the jurisdiction of the different courts over controversies with adverse claimants, we see no reason to doubt. The title of the section, "Jurisdiction of United States and *state* courts," shows that it was so intended. It limits the United States circuit court to jurisdiction of such controversies where the amount and citizenship would have given it jurisdiction without the act, *except as to proceedings in bankruptcy*, where the United States circuit court, under subdivision c., of the same paragraph has concurrent jurisdiction with courts of bankruptcy of offenses enumerated in the act, and such jurisdiction as the United States circuit court may have in bankruptcy proceedings under subdivision b. of section 19, in the same Chapter 4.

It also limits the right of the trustee to bring actions to the same courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted,

and that this subdivision b. expressly relates to *state* courts, and that the trustee is limited to actions therein where controversies arise with adverse parties is shown by the title of the section, which is, "Jurisdiction of the United States and *state courts.*"

That Congress did not intend to give bankruptcy courts jurisdiction over such controversies is further shown by the fact that no method of appeal from decisions in such controversies is provided for in the law.

If Congress had intended (as we claim it did) to limit the jurisdiction of suits between the trustee or bankrupt and adverse claimants to the same state and federal courts as would have had jurisdiction, if there had been no bankruptcy proceedings, it would, in determining what provisions of law were necessary to carry out such plan, have had before it these two facts: 1st., that under the old bankruptcy acts such jurisdiction had been expressly granted and conferred upon bankruptcy courts; and 2nd., that notwithstanding such grants of jurisdiction to the bankruptcy courts, the Supreme Court of the United States in Eyster v. Gaff, and other cases cited above, had determined that the adverse claimant had the right, without special grant in the law to bring such suits in the proper state courts. Therefore, it must have appeared to them necessary to refuse in the present act to grant such jurisdiction to the bankruptcy court, and to provide that the trustee could only bring such suits in the same courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted. That is, it was necessary, under the decision of this court in Eyster v. Gaff to provide specially for the bringing of suits against the trustee.

And we find in examining the present bankruptcy act that Congress proceeded in exactly that way, and in that act, unlike the previous acts, no such jurisdiction is conferred upon the bankruptcy courts. And further, the jurisdiction of suits brought by the trustee *is expressly limited to those courts where the bankrupt might have brought the suit.* And under Eyster v. Gaff, the adverse claimant has always had the right to proceed in the state court, or in the circuit court of the United States, if the citizenship and amount involved gave it jurisdiction.

Such seems to us to be the plain meaning of the act. Jurisdiction of such controversies exists only in the courts which would have had jurisdiction had bankruptcy proceedings not been brought except by consent of the parties. It seems to us that this is the natural construction, the reasonable construction, the necessary construction, in the light of all the facts.

The bankruptcy court, it will be admitted, as provided in Chapter 2, section 2 of said act, has jurisdiction of all matters in the bankruptcy proceeding, but such jurisdiction in bankruptcy proceedings does not extend to the determination of controversies as to the ownership or right of possession of property between the trustee or the bankrupt and adverse claimants, nor is such jurisdiction on the part of the bankruptcy courts at all essential or necessary. Such is the legitimate conclusion deducible from the decisions of this court in upholding, under the prior law, the concurrent jurisdiction of the state courts in such proceedings. For if it was necessary that the bankruptcy court should decide such proceedings, it would be necessary that it should decide all of them, and the holding that the state courts had concurrent jurisdiction, under the old law, of such controversies, and the satisfactory practice under such rulings shows conclusively that such jurisdiction is not at all necessary or essential to courts of bankruptcy.

If it were at all necessary in interpreting the law to take into consideration the intentions of Congress as found and expressed in the debates on the bankruptcy bill, it would be found that the construction of the law contended for by us, is that which it was understood in both houses of Congress would be put upon it.

Bankruptcy bills of different forms and with different provisions have been before Congress periodically for the last eight or ten years. The bill which finally passed was introduced in the Senate March 22, 1897, and is known as S. 1035.

Senate Journal, 1st session 55th Congress, page 22.

It was reported by the committee on March 23, 1897, by Mr. Lindsay. (Senate Journal, page 23.)

On March 25, 1897, Senator Nelson, as an amendment, offered a substitute bill. (Congressional Record 55th Congress, 1st session, pages 238 and 239.)

April 5, 1897, Senator Lindsay made the opening speech in the senate on the bill reported by the committee. (Congressional Record 55th Congress, 1st session, page 625.)

The substitute offered by Senator Nelson was passed April 22, 1897. It then went to the House, and the House committee reported a substitute, being practically the same bill originally reported by the committee in the Senate, and the bill reported by the House committee as a substitute for the Nelson bill was passed by the House. Subsequently conference committees were appointed by the House and Senate, and the bill as originally presented to the Senate by its committee being the bill reported by the House as a substitute for the Nelson bill was passed, and became a law.

Section 23 of the present law was, I believe, contained in the original bill reported to the Senate by the committee, and in the substitute bill reported by the House, and of course in the bill as passed. Senator Lindsay, in his speech in the Senate (Congressional Record 55th Congress, 1st session, page 625), speaking of the "Courts," said: "United States courts have only a limited jurisdiction, and hence it is necessary to provide with particularity their entire jurisdiction in bankruptcy proceedings, and this is done with care. One of the features of the bill specially pleasing to me, is that it does not attempt to provide new methods for accomplishing results, but, as far as possible adopts those in force under other laws. * * *

In prior bankruptcy laws jurisdiction to try all controversies in bankruptcy has been given to the United States courts, but the provisions of this bill *are quite the reverse*, and under litigation will not, of necessity, be taken to the United States courts, but *will be tried in the courts which would have had jurisdiction of the controversy as between the bankrupt*—had bankruptcy proceedings not intervened—*and the adverse party*. Let me explain how important this is to citizens residing at a distance from where the United States courts convene. I will give an illustration drawn from imagination, of a case in my own state, but it will be equally applicable to any other state. Suppose a transaction is had between a resident of of Louisville and a citizen of one of the counties of Kentucky farthest from

Louisville. When the transaction is entered into, the resident of Louisville, of course, knows that if the matter should become a subject of litigation he would be required to bring suit in the county where the other party to the transaction resides; on the other hand, if the citizen residing in the remote county desires to bring suit, he must in turn go to Louisville. It will be apparent to everyone that this condition ought not to to be disturbed in the event of either of the parties becoming bankrupt. The bill, therefore, provides that if the Louisville party is compelled through adverse circumstances to take advantage of the benefits of the bankruptcy act, and the other party desires to sue his trustee, he must go to Louisville to do so. On the other hand, if the trustee must sue the party residing at a distance from Louisville, he will have to go to the county where the proposed defendant resides. This provision is a complete answer to the just criticisms of the last law, that many people were required to go long distances to the United States courts to litigate controversies with bankrupt estates." And on page 927 he says: "The fact that litigation will continue *in the state courts*, and that referees may be appointed in every county, will prevent the concentration of bankruptcy business in the places where the bankruptcy courts meet."

In the summary of the bankruptcy bill, printed at the request of Senator Lindsay, on page 628 of the same Congressional Record, is the following in relation to jurisdiction: "Section 8. Jurisdiction of the United States and state courts. The proposed plaintiff in a suit against a bankrupt estate may institute proceedings in the appropriate *state* court, or if it has jurisdiction, in the United States circuit court, or, if he desires, in the court of bankruptcy; but the trustee is limited, in the institution of such suits as he may wish to bring, to the court in which the bankrupt, of whose estate he is trustee, might have brought them, if bankruptcy proceedings had not been instituted. These provisions are for the purpose of having controversies litigated in the courts most convenient for the parties litigant and witnesses, *and to prevent the concentration of litigation in the bankruptcy courts.* The defendant and witnesses ought not

to be put to any greater trouble or expense, because the plaintiff has become bankrupt, than they would have been, had he not met with that misfortune."

On April 13, 1897 (See Congressional Record, folio 30, part 1, page 697) Senator Lindsay, in explaining the bill reported by the committee said: "The bill reported by the committee provides that the litigation between the creditors of the bankrupt and and the trustee for the bankrupt, whether the trustee be plaintiff or defendant, shall be had *in the state court*, to which jurisdiction would have attached if no bankruptcy proceedings had been commenced. In other words, *that the bankruptcy court shall not oust the state courts of their jurisdiction* and compel every man to go to the bankruptcy court to have his rights litigated, but upon the contrary, that unless the antagonist of the trustee of the bankrupt shall, by writing, consent to a change of venue to the bankruptcy court, no changes shall be made."

In the debate in the House of Representatives on 1035 S. on February 16, 1898 (See Congressional Record 55th Congress, 2nd session, page 2013) Mr. Henderson, among other things, said: "The jurisdiction of *state courts* to try controversies between the trustees of bankrupt estates and parties claiming adverse interests, is not in any way interfered with. Suits by the trustee shall only be brought in the courts where the bankrupt might have brought them, except for the misfortune of his bankruptcy, unless by the consent of the proposed defendant. Under the last bankruptcy law, the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses and attorneys. Such will not be the effect under this law. It is proper that such should not be the case, speaking generally in behalf of the administration of justice," and he continued with illustrations of the provisions of the law very similar to those of Senator Lindsay.

In none of the other speeches on the bill is any indication found that any different construction was put upon what is now subdivision 23 of the bankruptcy act.

In Congressional Record, 55th Congress, 2nd session, page 2122, Mr. Bell, in the house said: "That the jurisdiction of the state courts over the litigation between its citizens and between citizens of other states, where it does not equal in amount $2,000, is not disturbed."

Senator Lindsay was a member of the committee which reported the original bill to the Senate. Congressman Henderson was on the committee of the House which had in charge the bill. Both of them put the construction upon the provisions of the bill which is contended for by the petitioners here. No other construction of it appears to have been thought of. The debates clearly disclose the purpose and intention of Congress.

Subdivisions a. and b. of section 23 of the present act must be read together and interpreted from the text, not of either alone, but of both standing together, and what they mean is, that in a proper case the United States circuit court, and in a proper case the state court, shall have jurisdiction of all controversies at law and in equity between the trustee as such, and the adverse claimant concerning the property acquired or claimed by the trustee in exactly the same manner as the same courts would that have had jurisdiction, if there had been no bankruptcy proceedings at all. The decisions of the inferior federal courts under the bankruptcy act of 1898 have not been consistent in regard to the proper construction of section 23.

We are, however, of the opinion that the better considered cases have given to that section the construction contended for by us.

In re. Abraham, 93 Fed. Rep. 767, the circuit court of appeals for the fifth circuit passed upon the question of the construction of that section, and after reviewing the decisions of this court under the old law, on page 779, say: "It is, therefore, apparent that, as a general rule, all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such or other duly appointed and empowered representatives

of the bankrupt's estate, and adverse claimants, concerning the property acquired or claimed by the trustees or other duly appointed and empowered representatives of the estate, which cannot be or are not adjusted by negotiation, arbitration or compromise, must be abandoned by the trustees or adjudicated in the *state courts*, unless by consent of the proposed defendant suit can be brought in the United States court.

See also Hicks v. Knost, 94 Fed. Rep. 625, where Judge Thompson construes these provisions, and also the argument of the defense in that case that jurisdiction of such controversies was necessary to bankruptcy courts, and finally concludes by taking the same position contended for by the petitioners in this case.

In re. Franks, 95 Fed. Rep. 635;
Goodier v. Barnes, 94 Fed. Rep. 798;
Heath v. Schafer, 93 Fed. Rep. 647;
In re. Price & Co. 1 Am. Bank Rep. 606;
In re. Broadbine, 93 Fed. Rep. 643;
In re. Buntrock Clothing Co., 92 Fed. Rep. 886;
In re. Fowler, 1 Am. Bank. Rep. 637;
In re. J. N. Carter, 1 Am. Bank. Rep. 160;
Mitchell v. McClure, 91 Fed. Rep. 621;
In re. Kelley, 91 Fed. Rep. 504;
In re. Rockwood, 91 Fed. Rep. 363;
Burnett v. Morris Co. 91 Fed. Rep. 365;
Camp v. Zellars, 94 Fed. Rep. 799;
Perkins v. McCauley, 98 Fed. Rep. 286;

There are also a line of cases which hold that 23b. deprives the bankruptcy court of jurisdiction of controversies which might have arisen between the bankrupt and the adverse claimant, but that where the action is one which the bankrupt would himself have had no right to bring, as for instance, an action to set aside a fraudulent conveyance, that the district court in such cases, has jurisdiction.

In re. Brooks, 91 Fed. Rep. 578;
In re. Carter v. Hobbs, 92 Fed. Rep. 594;
Perperdine v. Headley, 98 Fed. Rep. 863;
Layman v. Crosby, 98 Fed. Rep. 542;

Davis v. Bohle, 92 Fed. Rep. 325;
In re. Gutwillig, 90 Fed. Rep. 475.

These cases in the court below were cited against us, but in reality they cannot be said to be opposed to our contention in this case. There is a dictum in the decision in re. Sievers, 91 Fed. Rep. 366, taking a contrary view of section 23, but what is there said was not necessary to the decision, and the case was not affirmed on the appeal to the circuit court of appeals on that ground. In the circuit court of appeals it appears as Davis v. Bohle, 92 Fed. Rep. 325.

The argument of those cases which may be said to take a contrary view of the jurisdiction of the bankruptcy court will be found in In re. Murphy, Vol. 2, Natl. Bank. News & Rep. No. 8, page 393;

In re. Sievers, 91 Fed. Rep. 366;
And in re. Hammond, 98 Fed. Rep. 845.

In reading the opinions in these cases, it will be found that the courts have been compelled to put forced and unnatural construction upon the plain words in the act, and have, as they are forced to admit, gone contrary to the conclusions derived from a historical study of bankruptcy legislation.

See the statement of Judge Lowell in In re. Hammond supra, on page 851.

From the plain wording of the act itself, from the omission of the provisions as to the jurisdiction of bankruptcy courts contained in prior acts, from the express limitations placed upon such jurisdiction in the present act, from the history of previous bankruptcy acts, and from the interpretations placed upon the act by Congress, as shown in the debates on the bill, and from the decisions of this court under the old acts, we are convinced that the true construction of the present act is, *that the bankruptcy courts have no jurisdiction of controversies with adverse claimants of property*, unless with the consent of the claimant, and that *the exclusive jurisdiction of such controversies vests in the state courts, or in the circuit courts of the United States, where the citizenship and amount involved would otherwise give them jurisdiction.*

III.

With this introduction, we come now to the questions certified to this court for answer.

The first is, **whether the district court, sitting in bankruptcy, had jurisdiction by** *summary proceeding* **to compel the return of the property seized.**

It will be noticed, by a reference to the statement of facts, that the property was taken from the petitioners on *an order to show cause* in the district court, and that the property was ordered returned with a provision for its sale, and that the proceeds be kept separate and apart to abide the further order *of that court.*

In other words, the property was in a summary proceeding taken out of the hands of an adverse claimant, and he was left to seek his relief in a court of bankruptcy.

The cases cited under section 1 of our brief, and particularly the case of Donaldson v. Farwell, 93 U. S. 631, have settled the right of the plaintiffs in the action in state court, Bernard Cogan and James Cogan, to retake their property upon disaffirmance of the contract, and it is equally well settled, by the same cases, that this right to retake their property and to hold the same is just as full and valid and complete after bankruptcy and against the trustee as it is before; that is, the bankruptcy proceeding in no way changes the rights of the parties in and to the property.

It is also undisputed that at the time the order to show cause was issued out of the bankruptcy court, the property was then in the possession of the sheriff and the attorneys for the Cogans, who claimed to hold it for them.

Under such circumstances, it seems clear to us that the court had no jurisdiction in a summary proceeding to retake said property, and such was the rule under the bankruptcy act of 1867.

Eyster v. Gaff, 91 U. S. 521;
Smith v. Mason, 14 Wall. 433;
Yeatman v. Savings Institution, 95 U. S. 764;
Marshall v. Knox, 16 Wall. 551.

If it be true, as we have claimed in our brief, under subdivision II, that the district court in bankruptcy has not jurisdiction to

determine this controversy, then it has not jurisdiction, in a summary proceeding, to take possession of property, the title to which it cannot determine.

That is, the present act denying to the bankruptcy court jurisdiction to determine controversies as to property between a trustee in bankruptcy and an adverse claimant *ipso facto* denies the bankruptcy court jurisdiction in a summary proceeding to take from one of the parties to such controversy the subject matter thereof, and must of necessity be construed as denying to the bankruptcy court the right to interfere between the parties in any way which may affect their respective rights therein.

Nor is there any necessity or occasion for its interference.

The law does not authorize that which is vain or useless. And, therefore, if it be true that the bankruptcy court has not jurisdiction to determine the controversy, it has not authority to interfere therein, even to the extent of taking possession of it, as against an adverse claimant, because such taking is only permissible as an aid to the exercise of its jurisdiction over the controversy, and if it has no such jurisdiction, the reason for the taking of possession is wanting.

In re. Brodbine, 93 Fed. Rep. 643, the court, in speaking of the case of Mitchell v. McClure, say: "That if that court had no jurisdiction of the common law action to recover property *a fortiori*, it had no jurisdiction to recover it by a summary process."

If the district court had no jurisdiction to determine the controversy as a whole, it had no jurisdiction to determine a part of the question. The jurisdiction to transfer possession is dependent upon and auxiliary to the jurisdiction to determine the controversy. If the court has not jurisdiction of the controversy, it has not jurisdiction to make the order regarding its possession. In the case at bar, the District Court had no jurisdiction to divest petitioners of their possession, and compel them to go into the bankruptcy court to obtain a determination of their adverse claim.

Under the present act, the bankruptcy court having no jurisdiction whatever to determine the controversy in regard to the

ownership, even in a plenary suit, it seems to us idle for counsel to contend that it has jurisdiction in a *summary proceeding* to do that which it could not do in a suit. The greater includes the less, and if the bankruptcy court has no jurisdiction to determine the controversy, it has no jurisdiction to take the property for that purpose in a summary proceeding. It would be a proceeding vain and purposeless and without reason or utility to support it.

On the other hand, the state courts having, in the replevin proceeding, the jurisdiction not only of the parties, but of the subject matter, and having exclusive jurisdiction of the controversy, should be allowed to go on and determine it, making, if necessary, such other persons parties to it, as may be proper, and as is provided in subdivision B of section 11, of the bankruptcy act.

The second question certified up is, **whether after adjudication in bankruptcy an action in the state court can be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication.**

In considering this question it must be borne in mind, that the right of the plaintiffs in the replevin suit in state court to retake their property was unaffected by the pendency of bankruptcy proceedings. Their right to demand and retake the property existed just as much after the filing of the petition and adjudication of bankruptcy, as it did before.

Donaldson v. Farwell, 93 U. S. 639.

No trustee had been appointed. The title to the bankrupts' property, and the right of possession thereof was still in the bankrupts. The decree of bankruptcy did not divest them of their title. No receiver had been appointed, no marshal had been authorized to take possession.

This court in Hamilton v. Rouse. 22 Wall. 263, decided that a decree in bankruptcy will not, under the bankrupt act, have the effect to discharge the debts of the petitioner, nor to divest him of the title to either his real or personal estate, and this court there said: "Prior to the assignment and conveyance authorized and directed by section 14, the title, whatever it be, of the estate belonging to the debtor, both real and personal, remains

unchanged," and on page 275 this court further said "until an assignee is appointed and qualified, and the conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the 14th section of the bankrupt act." And it may be noticed that the provisions of the law of 1867 and the law of 1898 differ from the provisions of the earlier bankruptcy laws in respect to the transfer of title.

Section 70 of the law of 1898 provides that the trustee of the estate of the bankrupt, *upon his appointment and qualification*, shall be vested, by operation of law, with the title of the bankrupt.

Therefore until the appointment of the trustee, the bankrupts were the parties in possession, unlawfully detaining the property of the plaintiffs in the replevin suit in the state court, and being the parties in possession they were the proper parties to demand the possession of and to bring the action against. Of course the trustee, when appointed, succeeded to the bankrupt's rights, if any, and could defend the action for them, and be made a party thereto, as is contemplated and provided in subdivisions b and c of section 11 of the bankruptcy act of 1898.

Under the old bankruptcy act, this court permitted the bringing of such action against the bankrupts by a third person claiming the property after the adjudication and before the assignment by the bankrupt to the assignee.

See Burbank v. Bigelow et al., 92 U. S. 179.

And this court there said, approving of the rule of Eyster v. Gaff, "that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons."

If under the old law such actions were properly brought, then there can be no question at all under the present law, which as we believe, gives the state courts the sole jurisdiction of such controversies.

Burbank v. Bigelow was in many respects like the replevin action in the state court in the case at bar. It was brought

after the filing of the petition in bankruptcy to determine a controversy in regard to property between an adverse claimant and the bankrupts, and the property in controversy had been referred to and described in the schedules filed in the bankruptcy proceeding, while in our case there was no reference to the property in controversy in the schedules in bankruptcy, unless the general reference to the stock in trade of the bankrupts could be held to include them. The same questions of jurisdiction were raised there and the proceeding there was upheld by this court, and the court there said they had recently held in the case of Eyster v. Gaff et al. "that the bankrupt law has not deprived the state courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons, and whenever the state courts have jurisdiction, the circuit courts of the United States have, if the proper citizenship exists." And in that case the court took possession of the property in controversy by a receiver. That case, it is true, was brought in the circuit court of the United States, but this court expresses a willingness to put the jurisdiction of the circuit court of the United States upon the ground that the state court would have had like jurisdiction.

Generally, it may be said that a party who owns property is entitled to the possession of it, as a matter of right. If anybody disputes the right of possession, he is entitled at once to his proper remedy, which in this case is an action in the nature of replevin.

The right to take the property peaceably or by such an action is an important right, and in many instances delay would result not only in great inconvenience, but in great loss and damage to the owner. There is nothing in the bankruptcy act which can be construed to compel a party to await the appointment of a trustee. Such delay might result in a loss of all the property to the party, through the acts of the bankrupts or third parties. No injustice or damage to any one can occur by upholding such a

practice. The rights of the bankrupts and the trustees are as fully protected as they are in controversies of the same kind between other persons.

There is nothing in the bankrupt act taking away, staying or limiting the jurisdiction of state courts to entertain such actions at any time, and so this court has said in Eyster v. Gaff and Burbank v. Bigelow. The trustee, when appointed, derives his title through a law of the country, and this title will be respected and protected in the state courts the same as that of any other person, and should be so respected, and the state courts have jurisdiction to enforce the rights of the trustee and protect them.

See Claflin v. Housman, assignee, 93 U. S. 130.

Under the present bankruptcy act, it seems to us there can be no question of the jurisdiction of the state courts to carry on such actions, and that in fact their jurisdiction of the controversies in regard to the right of possession of such property is *exclusive*, and under the decisions in Eyster v. Gaff, Burbank v. Bigelow, and McDonald v. Farwell, such right was recognized and enforced under the old bankruptcy act.

It is true that under the other acts some of the inferior federal courts before the decisions in Eyster v. Gaff and Burbank v. Bigelow, took a contrary view.

See In re. Vogel, 2 N. B. R. 427;
Same case, 3 N. B. R. 198;
In re. Steadman, 8 N. B. R. 319.

And these cases were cited by counsel on the other side in the court below, but they seem to be opposed to the doctrine of Eyster v. Gaff and Burbank v. Bigelow and Claflin v. Houseman, and certainly have no application under the present law.

After the decision in Eyster v. Gaff, the inferior federal courts seem generally to have followed a different rule, and to have upheld the jurisdiction of the state courts under the old bankruptcy act.

See Wente v. Young, 17 N. B. R. 90;
Leighton v. Harwood, 12 N. B. R. 360;

Also the earlier cases, Peiper v. Harmer, 5 N. B. R. 252; Wolfolk v. Murray, 10 N. B. R. 540.

The title of the bankrupt of the trustee in bankruptcy, and of the purchaser from the trustee is liable to be defeated at any time by the claim of an adverse party who has a better title than the bankrupt had. It is just as proper that this question should be determined in an action in a state court having jurisdiction against the bankrupt or the trustee, as in an action against their assignee, and the proper defendant in such action is the party in whom the title and possession was at the time of the commencement of such action.

In the case at bar the proper defendant in the state court was the bankrupt in whom the title and possession was when the action was commenced.

Unless there is something in the bankruptcy act limiting the jurisdiction of the state courts, it seems to us clear that they would have jurisdiction of such actions, and we find nothing in the act which in any way can be construed as limiting their right to proceed in, and decide such controversies; and what there is in the act in relation to such jurisdiction not only tends to strengthen their jurisdiction, but also demonstrates that they not only have jurisdiction, but have exclusive jurisdiction of such controversy.

5.

The third question certified, is **whether the property of the bankrupt, upon his adjudication in bankruptcy is** *in custodia legis* **of the bankrupt court, and can be taken possession of under process of the state court.**

The doctrine of *custodia legis* has been many times expounded in this court, and the general rule seems to be that the property is not in *custodia legis* until it is in the actual possession of the officer of the court. In Freeman v. Howe, 24 How. 453, the property was in the actual custody of the marshal who had seized it (see opinion, page 453). And in the still earlier case of Taylor v. Carryl, 20 How. 581, this court, on page 599, said: "It follows that to give jurisdiction *in rem*, there must have been a *valid seizure*, and *an actual control* of the ship by the marshal of the court." And in

Covel v. Heymen, 111 U. S. page 176, on page 179, this court says: "The point of the decision in Freeman v. Howe is that when property is *taken and held under process*, it is in the custody of the law," and further on it is said, "That it is the *possession* that cannot be disturbed." And on page 182, "The first levy, whether made under federal or state authority, withdraws the property from the reach of the process of the other." Counsel below argued that the decision of this court in Shields v. Coleman, 157 U. S. 168, was to the effect that the mere bringing suit was a sufficient seizure, but such is not the fact. The court there expressly stated that it was unnecessary to decide such question. (See page 177.)

Bankruptcy proceedings are instituted primarily for the purpose of adjudicating upon the question of bankruptcy, and upon the question of granting a discharge. Upon these questions, and the ordinary proceedings in bankruptcy, the jurisdiction of the bankruptcy court, when once invoked, is doubtless exclusive.

But the question of whether or not, by the filing of the petition or the adjudication of bankruptcy, the bankruptcy court obtains control of all property, including that claimed adversely, so that the same may be said to be *in custodia legis*, is a far different question.

In determining it, we must first consult the bankruptcy act which is said to bring this about.

The act itself does not contemplate any such thing. It proceeds upon the theory rather that until the appointment of a trustee the bankruptcy court is not in possession of the property. Thus we find that authority is given to the court, in chapter 2, section 2, subdivision 3, in special cases, to appoint receivers or marshals, in case the court shall find it absolutely necessary for the preservation of the assets, *to take charge of the property of the bankrupts.*

See also subdivision e. of section 3, and section 69.

Therefore the act contemplates that the court shall not have custody of the property, except in special instances, and in those instances provides how such charge shall be obtained, and that is in all cases *through an officer of the court*, a marshal, or receiver, or trustee.

So, it is provided in section 70 that the trustee of the estate of the bankrupt, upon his appointment and qualification, shall in turn be vested by operation of law with the *title of the bankrupt* as of the date he was adjudged a bankrupt.

That is, it is not contemplated that the title of the bankrupt shall be divested until the appointment and qualification of the trustee, and until the appointment of the trustee the title and possession remain in the bankrupt, unless some other court gains jurisdiction thereof.

It was held in Hampton v. Rouse, 22 Wall. 263, on page 275, under the provisions of the act of 1867, which are similar to section 70, "that until the assignee is appointed and qualified, and a conveyance or assignment is made to him, the title to the property, whatever it be, remains in the bankrupt, which is the plain meaning of the 14th section of the bankrupt act."

Thus the law contemplates that the only possession which the courts of bankruptcy shall have of the property shall be through their officers to-wit: marshal, receiver, or trustee, and the law provides no other way by which the court shall gain the custody of the property, or have it in its charge, except through the officers named, and under proper process or order in the case of a receiver or marshal, and under the law itself in the case of a trustee.

And if a marshal or receiver is not directed to take the property, or appointed to take it, and if a trustee is not elected, the court never gains the custody of the property, but the title and *possession* remain in the bankrupt.

It is true that the law of 1841 provided differently. (See Hampton v. Rouse on page 275).

Under the wordings of the act, and the decisions of this court in Hampton v. Rouse, it seems to us clear that the property cannot be said to be in *custodia legis* until seized by a marshal or receiver, or until the appointment of the trustee in the bankruptcy proceeding, and that until that time the title and right of possession remains in the bankrupts, though it may well be true that

the adjudication in bankruptcy is notice to any person dealing with the bankrupt, and that in so dealing with the bankrupt he will act at his peril, and liable to have the transaction avoided by the trustee thereafter appointed in a proper proceeding, but such rule in no wise affects the case at bar, for the right here claimed is one which could be exercised against the bankrupt or the trustee equally, and is in no wise impaired by the bankruptcy proceedings.

That is, by way of illustration, if A. owned a team of horses which are in B.'s barn for keeping; B. filed a petition in bankruptcy, and was adjudged a bankrupt, and scheduled the team as his; A. nevertheless would at any time, as against the bankrupt, or his trustee, have the right to retake his horses peaceably if he could, by a writ of replevin if necessary. Subject at all times to the right of the bankrupt and of the trustee when appointed, to appear in the action and dispute his claim; or if he had taken them without suit, to bring action against him for their value if he disputed his title. But if, on the other hand, B. being the owner of the two horses filed a petition and scheduled the property as his, and was adjudicated a bankrupt thereon, and before the appointment of a trustee sold them to C., the trustee, when appointed and qualified, would have the better title because by relation his title antedates that of the purchaser.

Bankruptcy proceedings can have no more effect upon the rights of an adverse claimant (one who claims the ownership of the property as against the bankrupt or his trustee) than a foreclosure proceeding against a mortgagee would have on a third party not a party to the action who claimed to own the premises adversely to the mortgagee's title, and yet the commencement of foreclosure proceedings is spoken of generally as notice to the world.

The point we make is that the determination of the ownership of the property is not a part of the *proceeding in bankruptcy*.

But all this in regard to the effect of the bankruptcy proceeding as notice is entirely different from the question of *custodia legis*. *That* under the wording of the act, and the decisions can only apply when the bankruptcy court, through its *officer appointed for that purpose, has taken possession of the property*.

The doctrine of *custodia legis* is only invoked in the aid of jurisdiction, and to prevent unnecessary and undignified contests between courts. If, therefore, the bankruptcy court has not jurisdiction under the present act to determine the controversy as to the title of the property replevined, then the reason, too, for the rule is wanting, and such, as we take it, is the situation here.

The state court has first obtained the actual possession of the property. It has not only jurisdiction, but exclusive jurisdiction to decide the controversy in relation thereto. It has not only the possession of the property, but jurisdiction of the parties. It would be a vain and idle formality which required the property to be returned to a court which could not decide the controversy in regard to it.

If such controversies are to be determined in the state courts in the same way they would have been determined *had bankruptcy proceedings not intervened*, then they should be decided in the same forms of action, and in determining the question of the title to personal property, the action of replevin is found particularly convenient and effective, and if the law is construed to mean, as we hold, that the state court has jurisdiction to decide the controversy, then as *a necessary part of that jurisdiction it must be allowed to determine the possession of the property*, and it must be allowed to proceed in accordance with the ordinary and usual forms of procedure, and in replevin actions it must be allowed to take for the purpose of deciding the controversy in regard to the title, *the possession of the property*, that its judgment may in the usual and ordinary form award the possession of that property to the proper party.

If it did not take the property, its judgment would be a nullity; it would not possess the right of enforcing its own judgment.

Our opinion is that under the present bankruptcy act the trustee, when appointed, stands merely as one clothed by the law with the title of the bankrupt, and that as such trustee he is liable to be sued by adverse claimants as any other person would be sued, or as the law puts it, *in the same courts where proceedings would have been brought had bankruptcy not intervened.*

That in this making him subject to the same courts and same proceedings *where adverse interests are concerned* as the bankrupt himself would have been, the law has acted most wisely.

The possession which he then holds is somewhat analogous to that of assignee under the voluntary assignment and insolvency laws of different states, and in such cases controversies of this kind are determined in actions at law in any court having jurisdiction of such actions. And in respect to such controversy the assignee sues or is sued the same as if he were a private individual, and not an officer of the court. Such, in fact, is the common practice in such cases, and it is the practice because experience has shown that in such actions only, can the rights of the parties be speedily and accurately determined, and the right of trial by jury be preserved, and as typical of this class of cases we call the court's attention to the following:

John V. Farwell Co. v. Hilton, assignee, 84 Fed. Rep. 293;
Bussing v. Rice, messenger in bankruptcy, 2 Cush. 48;
Farley v. Lincoln, assignee, 51 N. H, 577.

These cases are cited, not because the right to sue a trustee in bankrupty was in any way there considered, but because they show what the status of the officer holding what seems to be an analogous position is under the law of different states, and to a certain extent will perhaps serve to convey to Your Honors our idea of the status of the trustee in bankruptcy under the present act in respect *to adverse claimants.*

In the court below, counsel on the other side seemed impressed with the fact that because section 70 provides that the title of the trustees shall relate back to the date of the adjudication, that thereby the property became in *custodia legis* of the date of the adjudication. That this is not so was held by this court in Hampton v. Rouse, under the provisions of the law of 1867, which in that

respect were similar. But this provision of relation, is merely the common doctrine of *title by relation.*

It does not mean that the trustee shall have any possession by operation of law, but merely that he shall succeed to the title as distinguished from the possession which the bankrupt had. There is a vast difference between title and possession, and the fact that by relation the title dated back to the date of the adjudication is not the same as possession going back to that time. The provision which by operation of law makes the title of trustee relate back is an old fiction of the law, and is common in statutes relating to *executors, administrators, assignees and other officers.*

And as the supreme court of Wisconsin has said in the case of Hayden v. Roe, 66 Wis. 291: "The whole doctrine of relation is but a fiction or device of the law, and is hedged with limitations," and in Jac. Law Dictionary, under the head of "Relation," it is said: "This device is most commonly to help acts in law and make a thing take effect, and shall relate to the same thing, the same intent and *between the same parties only*, and it shall never do a wrong or lay a charge *upon a person that is no party.*"

This provision of title by relation is to enable the trustee to recover on a cause of action arising before his appointment, which he might not be able to do if the title only vested in him upon his appointment, and that is as far as it is ever necessary to extend the doctrine.

As we have said, it is the title only of the trustee which relates back, and it is only the *title of the bankrupt*, and if the bankrupt had no title, or if the lawful owner be in possession of the property when the trustee is appointed, or if a person claiming to be the owner be in possession when he is appointed, then though the trustee's title may relate back to the date of the adjudication, and enable him to litigate *the question* the same as the bankrupt might have done, yet there is nothing in the law which extends his *possession* back to the date of the filing of the petition or of the adjudication, and if he desires to question the

right of possession, or possession of such adverse claimant, he must do it in an action in the proper court.

If there arises in this case at all a question of *custodia legis* then, under the decisions it must be held that the state court, by proceeding in replevin *wherein it actually seized under the process of its court the property in controversy*, has obtained *custodia legis*, or perhaps better, that the property is now in *custodia legis* of such court.

This court, in a case which is somewhat similar to the case at bar, have settled that the doctrine of constructive possession can have no application here.

See Moran v. Sturgis, 154 U. S. 256.

In Moran v. Sturgis, a proceeding was commenced in the state of New York for the dissolution of a corporation, and on the 31st day of July the state court *appointed a receiver*. The order appointing the receiver and accompanying papers were filed in the state court in the forenoon of August 1. On the afternoon of August 1, and on August 3, Michael Moran and others filed libels in admiralty, in the district court of the United States for the eastern district of New York, against certain steamboats, the property of the corporation, and process was issued under the libels to the United States marshal for that district, and on August 1 he seized certain steamboats, and the balance on August 3. It was contended before this court in that case, that the state court, by virtue of the receivership proceedings, and the appointment of a receiver, gained *constructive possession* of the property, and that the same was therefore *in custodia legis*, and not subject to seizure by the marshal. This court held that inasmuch as the receiver had not filed his security when the marshal seized the boats, the property was not in the custody of the state court, and this court said, on page 284: "At the time these libels were filed and the marshall seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, *and he had neither actual nor constructive possession.*"

And in our case it may equally well be said, that when the state court took possession in the replevin proceeding, it had not developed whether or when a trustee would be appointed, or whether any would be appointed, or when he would enter upon the discharge of his duties. The case at bar is stronger than the case before this court in Moran v. Sturgis, because there a receiver had been appointed.

In our case *the trustee had not been appointed*, when the proceedings were brought, and what in that case was said in regard to the jurisdiction of the district court in admiralty, may be said of the jurisdiction of the state court in the replevin action in the case at bar, its jurisdiction was not concurrent with that of the bankruptcy court, but it was proceeding in the exercise of its jurisdiction to *determine a controversy* which the bankruptcy court, under the present bankruptcy act, had no jurisdiction to determine, and being first in the *actual possession* of the property, under the decision in Moran v. Sturgis, it should be held that the state court had jurisdiction, and that it is entitled to proceed in such action.

The Ironsides, 4 Bissell, 518.

In re. Chatwood, 165 U. S. 443, the bankruptcy court, though its trustee takes only the title of the bankrupt, it can sell only his title, and a sale by the trustee of property would in no way divest the real owner of his title. Bankruptcy courts can not determine such controversies unless jurisdiction is expressly granted them, for it is no part of the bankruptcy proceedings.

We can see nothing upon which to found an argument that the property was in *custodia legis* of the bankrupt court.

The conferring of *jurisdiction* on the state courts by the bankruptcy act, must be held to confer also the *authority to exercise* such jurisdiction, and therefore as against such court in the exercise of its exclusive jurisdiction to determine such controversy, it cannot be said that the property is *in custodia legis* of the bankruptcy court; otherwise we would have this predicament, one court claiming custody and denying the right of another court to interfere, while it has not the power itself to determine the controversy, and the other court with the power to determine the controversy with-

out the power to interfere. Such a state of things should not be permitted.

If the bankruptcy act confers on the state courts and the circuit courts of the United States in particular cases jurisdiction to determine such controversies, it must by necessary implication confer upon them the right to do all things necessary to carry out such jurisdiction, and must of necessity authorize and empower them to issue process against the bankrupts, or their trustee, and to issue process for the bringing into their control of the property in dispute, so that they can by their proper order or judgment determine to whom it shall go.

That construction of the law should be adopted which most clearly harmonizes its different provisions, while giving effect to all, and if the law be construed to mean that the trustee, though an officer of the court, in the eyes of the law stands as a person vested with the title of the bankrupt, and that the possession of the property in his hands is his possession, and not the custody of the court appointing him, and that he is liable, in regard to adverse claims to the property in his hands, to sue and be sued the same as the bankrupt could have sued or been sued, with the additional rights granted him of avoiding fraudulent transfers made by the bankrupt, then we have a construction of the law which will harmonize and protect the interests of all.

Where the tsustee thinks he is entitled to property adversely claimed, he must maintain his suit at law in the same courts the bankrupt would have been obliged to bring it, and where persons contest with him adversly the title to property in his hands, they can proceed against him in the proper state court or in the circuit court of the United States; that is, as to all adverse claims, the trustee stands as a private individual, insofar as his right to sue or be sued is concerned. As to other matters strictly bankruptcy proceedings, like the distribution of assets, or the determination of equities or liens, the jurisdiction is in the bankruptcy court to be exercised upon the application of the trustee or other interested parties.

There can at this time be little question of the ability and fairness of state courts to determine these controversies. However, if it should appear for any reason that the state courts act unfairly in the matter, or that there is unnecessary feeling between the courts, then it is for Congress to give jurisdiction of such adverse controversies to the bankruptcy courts. The question is not which courts can best determine the controversy, but the question is, *what courts has Congress determined shall decide such questions*. And the intent of the law clearly is to leave questions of adverse ownership to the state and United States circuit courts.

THE LAW ITSELF DISPOSES OF THE QUESTION OF CUSTODIA LEGIS.

If the doctrine of *custodia legis* has any application, the law itself has waived it by permitting such controversies to be determined in state and United States circuit courts. The courts always have had power to permit their officers to be sued, and of course Congress had ample power to so provide by law. And in giving to state courts jurisdiction of controversies with adverse claimants it has taken from the bankruptcy courts the right to resist any such jurisdiction under the claim of *custodia legis*. In the same way Congress has provided for such suits against receiver of federal courts in state courts without leave of the court appointing them.

If by the bankruptcy act itself jurisdiction of controversies with adverse claimants is given to the state court, is it not absurd to say that the commencement of bankruptcy proceedings under the act prevents the exercise of such jurisdiction?

The controversy here is whether the bankrupt had any interest in this property, whether there was any title to pass to the trustee, or any interest in the property for the bankruptcy court to act on in bankruptcy proceedings. This question was under the old law to be decided by the court first taking jurisdiction for that purpose. Under the present law, it is to be decided by the state or United States circuit court in a proper action. And the true rule seems

to be that the bankruptcy court acquires no custody of the property except through the taking possession thereof by its proper officers, towit: marshals, receivers, or trustees. That when property claimed adversely by third parties is in the possession of its trustee, it is not in *custodia legis* so as to prevent the jurisdiction of state courts, or the circuit courts of the United States attaching for the purpose of determining controversies between such trustee and adverse claimants as to the ownership of such property; and adjudging its delivery to the person determined to be the owner thereof. For such jurisdiction is given by the law creating the bankruptcy courts, and their jurisdiction is at all times limited by the terms of the act, and cannot be extended so as to defeat the jurisdiction of other courts whose jurisdiction is expressly recognized by the act. The law itself has waived any application of the doctrine of *custodia legis*, and has expressly authorized and empowered other courts to adjudicate upon controversies with *adverse claimants* as to the ownership and possession of property.

In conclusion we respectfully submit that:

1. The controversy herein is with an *adverse claimant*.

2. That the state and United States circuit courts have *exclusive* jurisdiction of such controversy.

3. That the trustee in such controversy has no better title than the bankrupt.

4. That under the old law the bankruptcy court had no authory to decide such controversy in a summary proceeding; and under the present law has no jurisdiction to decide such question or retake the property in any proceeding *unless with the consent of the adverse claimant*.

5. That under the bankruptcy act of 1867 actions were properly commenced against the bankrupt to recover property (Burbank v. Bigelow)and under the present law can be so commenced and prosecuted.

6. That there is nothing in the present law to prevent actions against the bankrupt after adjudication, and in actions brought by adverse claimants to recover property under claim of

ownership the proper defendant is the person in possession, be he bankrupt or trustee.

7. That the bankruptcy court does not acquire custody or control except through the acts of its marshals, receivers, or trustees in taking possession of the property.

8. That in such cases the trustee takes only the title of the bankrupt liable to be defeated at any time by an adverse title.

9. That the property, as to adverse claimants, by the terms of the act itself, is never *in custodia legis* so as to prevent such claimants contesting such rights in state or U. S. circuit courts.

10. That such courts have jurisdiction by the wording of the act and that the grant of such jurisdiction implies the right to exercise it in the usual way, by taking possession and awarding possession to the person entitled thereto.

11. That the state court has obtained jurisdiction both of the necessary parties and of the subject matter of the controversy in the case at bar.

12. That if the trustee desires to litigate with the adversr claimant the question of title, he should under the provisions of the bankruptcy act be made a party to the action in state court, or perhaps bring an independent action there.

And that to the questions certified to this court in this proceeding, the following answers should be returned:

First. The district court sitting in bankruptcy has no jurisdiction, by summary proceedings, to compel the return of the property seized.

Second. After adjudication in bankruptcy, an action by an *adverse claimant* can be commenced and maintained in state court against the bankrupts to recover property in their possession and claimed by them at the time of the adjudication.

Third. Upon the adjudication of bankruptcy, the property of the bankrupt is not in *custodia legis* of the bankruptcy court, and it may be taken possession of under process of the state court in an action brought by an *adverse claimant*.

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